Editor's note: Reconsideration denied by order dated March 4, 1981

ALYESKA PIPELINE CO.

IBLA 80-662 Decided January 30, 1981

Appeal from decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, approving Native allotment application F-15539.

Vacated and referred to Hearings Division.

1. Administrative Procedure: Generally--Alaska: Native Allotments

> Where a party holding an interest in property which may be adversely affected by the granting of a Native allotment points out facts of record indicating that the Native's use of the property may not have been continuous or exclusive for 5 years and that the claim may have been abandoned, the matter will be referred to the Hearings Division for a hearing before an Administratiave Law Judge to inquire into the circumstances surrounding this occupancy.

APPEARANCES: James R. Peterson, Esq., Anchorage, Alaska, for appellant; Walter T. Zulkoski, Esq., Fairbanks, Alaska, for respondent.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On April 14, 1980, the Fairbanks District Office, Bureau of Land Management (BLM), wrote a letter decision to Shirley Butler, who had filed Native allotment application F-15539 pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (repealed December 18, 1971). This letter advised her that her application for 160 acres was approved. 1/

1/ Butler's application, dated November 9, 1971, was first received by BLM on March 1, 1972. On December 31, 1975, BLM rejected this application, and Butler appealed to this Board (IBLA 76-520). We suspended

On April 29, 1980, Alyeska Pipeline Service Company (Alyseka), as agent for various oil and oil pipeline companies, 2/ filed a notice of transfer and entitlement to notice of proceedings under 43 CFR 4.401(b), noting that it held an interest in the lands covered by the allotment resulting from both a private agreement with Butler granting it a right-of-way, and a grant of a right-of-way by the Secretary of the Interior pursuant to the Trans-Alaska Pipeline Authorization Act of 1973, 87 Stat. 584, 43 U.S.C. §§ 1651-1655 (1976). Alyeska was apparently unaware at this time that BLM had issued a decision on April 14 granting the allotment to Butler. In response to its notice, BLM apparently sent Alyeska a copy of this decision, and Alyeska filed a notice of appeal from it on May 15, 1980, protesting the validity of Butler's allotment application.

Alyeska states on appeal that Butler is not entitled to the land described in the allotment application. Additionally, it points out that the trans-Alaska oil and gas pipeline, which it claims as agent for its principal companies, is located on the land for which Butler has applied. Accordingly, this matter is governed by section 905(a)(j) of the Act of December 2, 1980, P.L. 96-487, 94 Stat. 2435-36, which provides as follows:

> Paragraph (1) of this subsection and subsection (d) [which provisions legislatively approve Native allotment applications in some circumstances] shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the 180 day following the effective date of this Act --
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> (c) A person or entity files a protest with the Secretary stating that the appliant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

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fn. 1 (continued)
consideration of this appeal and others concerning Native allotments pending judicial resolution of controlling legal issues. On April 30, 1979, sub nom. John Moore, 40 IBLA 321, 86 I.D. 279 (1979), we set aside BLM's decision and remanded the matter to BLM to reconsider its decision and, if seen as necessary, initiate a contest proceeding as described in Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), and Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976). Subsequently, BLM requested additional evidence from Butler and apparently decided that this evidence cured the previous defects with the application.

2/ Arco Pipeline Co., Sohio Pipe Line Co., Exxon Pipeline Co., Amerada Hess Corp., Mobil Alaska Pipeline Co., Phillips Petroleum Co., and Union Alaska Pipeline Co.

Alyeska's protest to the validity of Butler's allotment application was filed in May 1980, long before the prescribed deadline, and it has supplemented its protest as recently as January 16, 1981. Therefore, it is appropriate to continue to adjudicate Butler's application and to consider Alyeska's objection to BLM's decision to grant it.

[1] Alyeska argues that Butler's application was not timely filed. Section 18 of the Alaska Native Claims Settlement Act, 85 Stat. 710, 43 U.S.C. § 1617 (1976), repealed the Alaska Native Allotment Act, supra, with a proviso for the processing of applications "pending before the Department of the Interior on December 13, 1971." On October 18, 1973, the Assistant Secretary, Land and Water Resources, issued a memorandum which interpreted the phrase "pending before the Department of the Interior on December 18, 1971." He declared:

> This phrase is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

This policy has been applied by this Board. Eleanor H. Wood, 46 IBLA 373, 377 (1980).

BLM did not receive Butler's application until March 1, 1972. However, the application is also date stamped "Received November 18, 1971, Bureau of Indian Affairs, Fairbanks Agency Office." 3/ Thus, in the absence of any facts showing that the date stamp is incorrect, Butler's application appears timely.

Alyeska also alleges that Butler's occupancy and use were not continuous or exclusive for 5 years, as required by 43 CFR 2561.2(a). Alyeska points to indications in the record that Butler may have been an independent citizen for herself. We have held in some cases that such use does not qualify as "use and occupancy" under 43 CFR 2561.0-5(a). Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). However,

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3/ The last part of the stamp, which indicates that it was made by the Fairbanks Agency Office is very faint. However, it can be read on the original application form which is in the record.

this does not mean that a minor may not establish qualifying use or occupancy--the issue is the nature of the use and occupancy. Bella Noya, 42 IBLA 59 (1979); Sara F. Lindgren, 23 IBLA 174 (1975). It must be achieved by an independent citizen in his or her own right and it must be at least potentially exclusive. Sarah A. Pence, 43 IBLA 266, 269 (1979); John Nanalook, 17 IBLA 335 (1974).

Alyseka asserts that Butler was 14 years of age, at the oldest, when she began her alleged 5-year period of use and occupancy of these lands. 4/ The age of 14 is not so young that it can be determined as a matter of law that an applicant was not capable of asserting the necessary independent use and occupancy. Eleanor H. Wood, supra at 373; see Bella Noya, supra; Nellie Boswell Beecroft, 41 IBLA 70 (1979). Rather, this determination will depend on the facts in a particular case.

Alyeska also alleges that Butler left the area near the claimed lands in 1963 to live in Chicago and, later, in Fairbanks, and argues that she abandoned her claim by so doing. We have held that there can be abandonment of a Native allotment claim. See Evelyn Alexander, 45 IBLA 28, 35 (1980); Mildred Sparks, 42 IBLA 155, 158-59 (1979); cf. Herbert H. Hilscher, 67 I.D. 410 (1960). Moreover, nonuse tends to vitiate any preceding period of effective qualifying use and occupancy. Mildred Sparks, supra; Natalia Kepuk, 23 IBLA 99 (1975); Elsie Bergman, 22 IBLA 233 (1975); William Carlo, Sr., 21 IBLA 181 (1975). Where there are no improvements on the site, where use was spotty, highly intermittent, and limited to food gathering, hunting, and fishing (uses which do not evince exclusive possession of the public domain), and where a lengthy period of nonuse demonstrates that the land has not been needed for subsistence purposes for years, it is reasonable to deny an allotment. Mildred Sparks, supra at 159.

The record shows that Butler visited the lands only occasionally and does not appear to have used the claim much at all after 1963. Thus, it is necessary to inquire further into the exact details of her use of the land during this time in order to be able to determine whether she abandoned the claim.

Finally, as we observed in Evelyn Alexander, supra at 37, under the Act of 1906, supra, Native allotments are made at the discretion of the Secretary. We perceive that there may be public policy and equitable considerations weighing against BLM's granting Butler full title under this Act. The parties should be given the opportunity to present evidence so indicating.

4/ Butler was born on November 21, 1943. She allegedly moved to Chicago, Illinois, no later than October 1, 1963. Thus, Alyeska argues Butler would have had to begun her 5-year occupancy no later than October 1, 1958, when she was 14 years old.

We conclude that it is necessary to inquire further into the circumstances surrounding Butler's alleged use of the lands. Accordingly, we vacate BLM's decision and refer the matter to the Hearings Division for a hearing whether her occupancy was independent and at least potentially exclusive, whether she abandoned her claim after 1963, and whether there were valid public policy reasons which might justify the Secretary's exercising his discretion to deny or modify this application for an allotment. The Administrative Law Judge to whom the matter is assigned should issue a decision which, in the absence of timely appeal to this Board, will finally resolve the matter.

Alyeska has filed a copy of a deposition of Butler apparently taken in conection with a civil action between them as to the efficacy of an agreement to grant Alyeska a right-of-way over these lands. This deposition includes testimony which may be relevant to the validity of her allotment and may be admissible as evidence in the administrative hearing. However, the appearance of an allotment applicant at such a deposition does not satisfy the minimum requirements of administrative due process to which the applicant is entitled under the doctrine announced in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Further, BLM was not a party to this private proceeding.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the matter is referred to the Hearings Division for appointment of an Administrative Law Judge to hold a hearing as described herein.

Edward W. Stuebing
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge